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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 76-5306

ERNEST JOHN DOBBERT, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

Petitioner requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Florida entered in the above styled case January 14, 1976.

REFERENCE TO OPINION BELOW

The decision of the Supreme Court of Florida affirming the judgment and sentence of the Circuit Court of the Fourth Judicial Circuit of Florida is reported at 328 So. 2d 433 (Fla., January 14, 1976), and is reprinted in Appendix A, infra.

JURISDICTION

The decision of the Supreme Court of Florida was handed down January 14, 1976. A timely Petition for Rehearing was filed, duly amended and denied April 5, 1976. A motion for extension of time to file this petition was addressed to Justice Powell June 16, 1976, and granted with leave to file by September 2, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1257 (3) (1970).

QUESTIONS PRESENTED

I. WHETHER THE IMPOSITION OF THE DEATH PENALTY AS TO THIS PETITIONER, PURSUANT TO A FLORIDA STATUTE PASSED SUBSEQUENTLY TO THE DATE OF THE ALLEGED OFFENSE FOR WHICH THE PETITIONER WAS CONVICTED, WAS A VIOLATION OF THE CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS AND A DENIAL OF EQUAL PROTECTION OF THE LAWS.

II. WHETHER THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE PETITIONER'S TRIAL SHOWS INHERENT PREJUDICE IN THE PRE-TRIAL SETTING AND JURY SELECTION PROCESS TO THE EXTENT THAT THE PETITIONER WAS DENIED DUE PROCESS OF LAW

CONSTITUTIONAL PROVISIONS
AND STATUTES INVOLVED

U.S. Const., art. I, Section 10, provides:

"No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin and Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

U.S. Const., amend. XIV, Section 1, provides:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fla.Const., art. I, Section 10, provides:

> "Prohibited laws. -- No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."

Fla.Const., art. X, Section 9, provides:

> "Repeal of criminal statutes. -- Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed."

Fla.Stat., Section 921.141 (1971) provides:

> "Recommendation to mercy. -- A defendant found guilty by a jury of an offense punishable by death shall be sentenced to death unless the verdict includes a recommendation to mercy by a majority of the jury. When the verdict includes a recommendation to mercy by a majority of the jury, the court shall sentence the defendant to life imprisonment. A defendant found guilty by the court of an offense punishable by death on a plea of guilty or when a jury is waived shall be sentenced by the court to death or life imprisonment."

Fla.Stat., Section 775.082 (1971) provides:

> "Penalties for felonies and misdemeanors. -- (1) A person who has been convicted of a capital felony shall be punished by death unless the verdict includes a recommendation to mercy by a majority of the jury, in which case the punishment shall be life imprisonment. A defendant found guilty by the court of a capital felony on a plea of guilty or when a jury is waived shall be sentenced to death or life imprisonment, and the discretion of the court."

Fla.Stat., Section 775.082 (1972 Supp.) provides:

> "Penalties for felonies and misdemeanors. -- (1) A person who has been convicted of a capital felony shall be punished by death unless the verdict includes a recommendation to mercy by a majority of the jury, in which case the punishment shall be life imprisonment. A defendant found guilty by the court of a capital felony on a plea of guilty or when a jury is waived shall be sentenced to death or life imprisonment, in the discretion of the court.
> (2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person who has been convicted of a capital felony shall be punished by life imprisonment.
> (3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment with no eligibility for parole."

Fla.Stat., Section 775.082 (1973) provides:

> "Penalties for felonies and misdemeanors. -- (1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedures set forth in Sections 921.141 result in findings by the court, that such person shall be punished by death, and in the latter event, such person shall be punished by death.
> (2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person convicted of a capital felony shall be punished by life imprisonment as provided in subsection (1).
> (3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1)."

Ch. 72-724, Laws of Florida (1972).
Fla.Stat., Section 921.141 (1973).

The pertinent verbatim texts of these provisions are set forth in Appendix B, infra.

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Florida filed on January 14, 1976, affirming Petitioner's conviction of first degree murder and sentence of death. Petitioner, Ernest John Dobbert, Jr., an indigent white male, was sentenced to die by the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida on April 12, 1974, following his conviction of the murder of his daughter, Kelly Ann Dobbert.

In January of 1973, an anonymous phone call notified the Division of Family Services (a subdivision of the Florida Department of Health and Rehabilitative Services) that there was evidence of child abuse at the residence of Ernest John Dobbert, Jr., in Jacksonville, Florida. A social worker from the Division of Family Services contacted a neighbor of Mr. Dobbert and made a preliminary determination that the anonymous caller had been mistaken. Before closing the case, the social worker personally contacted Mr. Dobbert and was told that the Dobbert children were in good health. The worker observed one child with Mr. Dobbert and was told by Mr. Dobbert that one other child was living with him in Jacksonville and that the other two children were in Wisconsin with Dobbert's mother. Mr. Dobbert further informed the worker that he intended to leave Jacksonville with the two children and return to his mother's home in Wisconsin. Following this meeting with Mr. Dobbert, the case was closed and filed away.

In the Spring of 1973, the Petitioner's son, Ernest John Dobbert, III, was found wandering outside a Holiday Inn in Jacksonville, Florida. Jacksonville police turned the boy over to the Division of Family Services. It was apparent that the boy had suffered injuries of one type or another to his back, his head and his feet. Upon questioning, the boy initially

indicated that he scraped his back on coral while swimming off a local beach. Following a brief confrontation with the Petitioner, the boy was taken before a local circuit judge who promptly placed the boy in the protective custody of the Division of Family Services. The boy told the judge that his injuries were a result of beatings by his father, that his brother and one of his sisters were dead as a result of beatings by his father, and that his remaining sister was at home with the father locked in a closet. The judge issued a warrant for Petitioner's arrest. Prior to service of the warrant, Petitioner left Jacksonville and proceeded to Fort Lauderdale, Florida. On April 13, 1973, Petitioner's daughter, Honore Elizabeth Dobbert, was found in a hospital in Fort Lauderdale with a note pinned to her clothing asking that she be sent to her mother in Wisconsin. The Petitioner's abandoned automobile was found under a bridge at the edge of the Intracoastal Waterway in Fort Lauderdale with a suicide note on the frontseat. The two Dobbert children were reunited under the protective custody of the Division of Family Services in Jacksonville and a search for their father, the Petitioner, began.

Press coverage began almost immediately and closely followed Petitioner's arrest in Texas and his ultimate extradition and return to Florida in October of 1973. (Appendix C, infra).

An indictment was filed December 27, 1973, charging the Petitioner with two counts of murder in the first degree and two counts of child torture. On January 15, 1973, Petitioner filed a motion requesting the trial court to enter an order specifying the manner of trial, number of trial jurors, and the penalties applicable to counts one and two of the indictment. As grounds for the motion, Petitioner stated:

> "1. The indictment herein only alleges a violation of Florida Statutes 782.04 and the undersigned attorney submits that there is presently great confusion in the law as to the manner of trial and the applicable penalties in a case where the alleged offense occurred at

the time specified in this indictment.

2. The confusion exists as a result of the case of State v. Lee, Case No. R-452, 1st DCA Florida, November 2, 1973, question certified to Florida Supreme Court January 7, 1974.

3. Unless this court enters its pretrial order as requested, defense counsel is unable to properly advise the defendant herein and is unable to properly prepare a defense."

The first degree murder charged in count one of the indictment of December 27, 1973, alleged that the death occurred on December 31, 1971. The first degree murder charged in count two of the indictment alleged that the death occurred between the first day of January and the 8th day of April, 1972. The trial court entered an order which sets forth verbatim:

"The within motion coming on to be heard in open Court, defendant being present and arguments presented, IT IS, THEREUPON, CONSIDERED ORDERED AND ADJUDGED that said Motion be and the same is hereby (sic) the court rules that this is a capital-death penalty with twelve man jury - - DONE AND ORDERED in open Court this 22nd day of February, A.D. 1974."

On January 30, 1974, Petitioner filed a motion for continuance. The trial court denied the motion for continuance on February 4, 1974. On February 8, 1974, the State filed an amended indictment, again charging two counts of murder in the first degree and two counts of child torture. Also on February 8, 1974, the Petitioner filed an Application for Constitutional Stay of Trial (Appendix D, infra). The application, filed pursuant to Rule 4.5(g), Florida Appellate Rules, raised the question of an ex post facto application of the new Florida death penalty sentencing statute.[1]

1. Ch. 72-724 (Appendix B, infra) which went into effect December 8, 1972.

At the time of Petitioner's Application for Stay of Trial in the Florida Supreme Court, the Lee case was on petition for writ of certiorari to that court and oral arguments were pending therein.

Oral arguments were heard on Petitioner's Application for Stay of Trial on February 18, 1974, and an order denying the application was entered the same day (Appendix E, infra).

On March 7, 1974, Petitioner filed a motion and affidavit for change of venue (Appendix F, infra), pursuant to Rule 3.240, Florida Rules of Criminal Procedure, and cited as grounds, inter alia:

"1. That Defendant stands accused of acts which are inherently odious and subject to inflammatory exploitation by the press and the electronic news media.

2. That the acts of which Defendant stands accused have in fact been widely exploited by the press and the electronic news media to the extent that Duval County, Florida, has become irreparably permeated with prejudicial publicity.

3. That the extensive publicity concerning the Defendant has included detailed accounts of the investigation of the case, a search for bodies by certain members of the Jacksonville Police Department accompanied by television news men, the flight of the Defendant, his subsequent extradition and arrest and lengthy speculation concerning the probable development of the factual and legal issues to be decided at trial.

4. That, as a result of the extensive publicity in this case, defendant has become known by name to the general populous of Duval County and Northeast Florida and that his name has come to be equated with the odious and infamous crime of child torture.

5. That the notoriety of this Defendant has been cited in the local press by an official employed by the Division of Family Services (State Department of Health and Rehabilitative Services) as a causative factor in the documented increase in reported cases of child abuse in Duval County, Florida.

6. That as a direct consequence of this extensive publicity and resulting notoriety,

> the atmosphere prevailing at this time, and likely to become exacerbated during the period immediately preceding trial, is so latent with the possibility of prejudice to this Defendant that there is reason to believe that a fair and impartial trial cannot be had in Duval County, Florida."

The supporting affidavits of three prominent Jacksonville attorneys were filed with the motion (Appendix F, infra). On March 12, 1974, following eleven months of continuous and unrelenting publicity concerning the case, the trial court entered a "gag order" forbidding the Jacksonville Sheriff's Office and all court personnel from making statements to the news media at any time before or during the trial. On March 15, 1974, an evidentiary hearing on the Petitioner's motion for change of venue was held. The Petitioner presented twelve witnesses, representatives of the news media in Jacksonville, Florida and displayed video tape and other exhibits of media coverage of the case. Following arguments of counsel, the trial court entered the following order:

> "Motion under advisement after one day of testimony & evidence, till it is determined from jury selection -- if it (sic) possible to get a fair & impartial jury."

Jury selection was scheduled for March 18, 1974. Prior to the commencement of the voir dire examination, the Petitioner objected to the method of trial selected by the trial court:

> "MR. SOUTHWOOD: Your Honor, also at this time I recall there was a motion made by the defense to -- that the court set forth the number of jurors in which (sic) this case will be tried. The court made its ruling. I did not see a written order to that effect and since I did not actually move to have it tried one way or the other, I would like to formally object at this time to the case being tried by twelve jurors and having the death penalty applicable to the first two counts.

> THE COURT: Yes, sir. All right, the court previously ruled that this was a death penalty or capital case and that the manner of trial would be by twelve man jury with the appropriate number of alternatives. All right, I deny the motion."

The voir dire examination began the morning of March 19, 1974, and continued until 10:15 A.M., Thursday, March 21, 1974, when counsel for Petitioner announced:

> "MR. SOUTHWOOD: The defense accepts the jurors tentatively. We would like to say that we do it with reservations. The defendant moved for a change of venue. It was taken under advisement and denied pending jury selection. The defendant does not waive this motion. The evidence presented in the change of venue shows the defendant would not receive a fair trial in Duval County. . . . (I)t would be unfair, and it further prejudiced the defendant's right to a fair trial if we were required to exercise all our peremptory challenges, since he must choose from a jury panel here in Duval County. Be tried from a jury panel here in Duval County. It must be clear on the record we don't waive our change of venue motion, but we will accept this jury because it is the best jury under the circumstances, but does not meet the constitutional standards for fair trial."

Eighty-eight veniremen had been interviewed. Prior to the final day of jury selection, the Petitioner had exercised twenty-four of his thirty-two peremptory challenges. There were forty-seven prospective jurors remaining for selection in the courtroom and seventy-five more available on call from the regular circuit court panel of jurors not used by other courts in session (Appendix C, infra, p. 15c).

Out of the eighty-eight examined on voir dire, only thirteen had no knowledge of the facts of the case. Of the thirteen, two were ultimately chosen to sit as jurors, seven were excused by the State, two were excused by the Petitioner, and two were excused for cause.

The trial proper began on March 25, 1974. On Friday, March 29, 1974, the jury returned verdicts of guilty of murder in the first degree as to count one of the amended indictment, guilty of murder in the second degree as to count two, guilty of child abuse (a lesser included offense) on count three, and guilty of child torture on count four.

A hearing pursuant to the new Florida death penalty sentencing provision was held the following morning. Prior to the commencement of the hearing proper, the Petitioner again objected to the application of the death penalty to this case:

> "MR. SOUTHWOOD: Judge, may I make just one note --
>
> THE COURT: Yes, sir.
>
> MR. SOUTHWOOD: -- for the purpose of the record? I would like to further object to this proceeding in that I do not feel, again, that the death penalty is applicable in this particular case or, of course, constitutional in any other crimes."

The court reiterated its earlier ruling as follows:

> "THE COURT: All right, I deny the motion, proceeding under various cases and the Rudolph Valentine Lee and other cases which I think justify the bifurcated trial."

Following the presentation of psychiatric reports and the arguments of counsel, the jury rendered an advisory sentence finding sufficient mitigating circumstances outweighing any aggravating circumstances and recommending by a ten to two majority a sentence of life imprisonment.

The Petitioner filed a timely motion for new trial on April 8, 1974. The motion for new trial was denied by the trial court on April 12, 1974. On that date the trial court overruled the advisory sentence of the jury and sentenced the Petitioner to death on count one of the amended indictment and to the

maximum prison terms on counts two through four, all sentences to be served consecutively.

The Petitioner was adjudged insolvent for purposes of appeal and a timely notice of appeal to the Florida Supreme Court was filed on April 25, 1974. The constitutional questions presented in this petition were assigned as errors on appeal, briefed and appeared before the Florida Supreme Court as follows:

> "II. THE TRIAL COURT ERRED IN FAILING TO CHANGE VENUE AND IN PROCEEDING WITH TRIAL IN JACKSONVILLE, FLORIDA.
>
> III. THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO DEATH.
>
> A. THE TRIAL COURT ERRED IN RULING THAT CAPITAL PUNISHMENT WAS APPLICABLE IN THE CASE AT BAR."

Oral arguments were heard by the Florida Supreme Court on April 3, 1975, and the court affirmed the judgment and conviction in the trial court. Dobbert v. State, 328 So. 2d 433 (Fla. January 14, 1976).

The Florida Supreme Court did not address the ex post facto question in its decision. As to the trial court's failure to grant the Petitioner's motion for a change of venue, the majority opinion, citing Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed 2d 589 (1975), held that the trial judge did not abuse his discretion in denying the motion for change of venue. Dobbert at 440.

There were three dissenting opinions: Justice Boyd would have reversed for the trial court's failure to charge the jury that it was authorized by law to find the Petitioner guilty of attempted murder and for the failure of the trial court to grant the Petitioner's motion for change of venue; Justices Overton and England would have reversed the trial court's decision to overrule the advisory sentence of the jury and would have required the adoption of the jury's recommendation of life imprisonment, citing Tedder v. State, 332 So. 2d 908 (Fla. 1975).

Petition for Rehearing was denied on April 5, 1976. Application for Stay of Execution of the death sentence in this case was granted by Justice Powell on May 3, 1976. A Motion for Extension of Time to File this Petition for Certiorari was granted by Justice Powell on June 21, 1976.

REASONS FOR GRANTING THE WRIT

I.

A. EX POST FACTO

This petition presents a significant and unique example of an ex post facto application of a state statute whereby the Petitioner was deprived of the most substantial right known to man -- the right to life itself.

The earliest and most often quoted judicial interpretation of Article I, Section 10 (3) of the United States Constitution was delivered by Justice Chase in 1798, nine years from the date of the establishment of that constitution. In Calder v. Bull, 3 U.S. 386, 3 Dall. 386 (1798), Justice Chase said:

> ". . . the plain and obvious meaning and intention of the prohibition is this: that the legislators of the several states, shall not pass laws, after a fact done by a subject or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition, considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation.
>
> I will state what laws I consider ex post facto laws, within the words and intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes

> it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, then the law required at the time of the commission of the offense, in order to convict the offender. All these, and similar laws are manifestly unjust and oppressive." 3 U.S. 388-390.

The decision of the Florida Supreme Court below, affirming the Petitioner's death sentence is a "Category 3" violation of the ex post facto prohibition as defined by Justice Chase: it has the effect of changing the punishment and inflicts a greater punishment than the law provided for the crime when committed.

The pertinent legislative facts are as follows:

On December 31, 1971, the date of the offense for which Petitioner was sentenced to death, Fla.Stat., Section 921.141 (1971) provided:

> "A defendant found guilty by a jury of an offense punishable by death shall be sentenced to death unless the verdict includes a recommendation to mercy by a majority of the jury. When the verdict includes a recommendation to mercy by a majority of the jury, the court shall sentence the defendant to life imprisonment. A defendant found guilty by the court of an offense punishable by death on a plea of guilty or when a jury is waived shall be sentenced by the court to death or life imprisonment."

On December 31, 1971, Fla.Stat., Section 775.082 (1971) provided:

> "A person who has been convicted of a capital felony shall be punished by death unless the verdict includes a recommendation to mercy by a majority of the jury, in which case the punishment shall be life imprisonment. A

> defendant found guilty by the court of a capital felony on a plea of guilty or when a jury is waived shall be sentenced to death or life imprisonment in the discretion of the court."

On April 12, 1974, the Petitioner was sentenced to death pursuant to Fla.Stat., Section 921.141, as amended by Ch. 72-724, Laws of Florida (1972), which provided for bifurcated guilt/penalty trials at the conclusion of which the final determination of life or death was given to the trial judge, subject to review by the Florida Supreme Court (Appendix B, infra).

On April 12, 1974, Fla.Stat., Section 775.082 (1), as amended by Ch. 72-724, Laws of Florida (1972), provided:

> "(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty five (25) calendar years before becoming eligible for parole (unless sentenced to death)." (Emphasis added)

The sentence of April 12, 1974, overruling the jury's recommendation of life imprisonment (by a ten to two majority) constitutes an ex post facto application of a state statute because:

1. If Petitioner had been tried under the law in effect at the time the offense was committed a recommendation of mercy by a majority of the jurors would have automatically resulted in a life sentence. The jurors in Petitioner's case did vote ten to two for life. By application of Fla.Stat., Sections 775.082 (1) and 921.141 as amended, Petitioner was denied that degree of mercy afforded by the earlier version of the statute and in fact received the death penalty when he would have received life.

2. The trial court in the case sub judice was faced with a confusing array of legislative enactments and judicial interpretations of those enactments in the wake of this Court's

decision in Furman v. Georgia, 408 U.S. 238 (1972).

In anticipation of the Furman decision, the Florida legislature amended Fla.Stat., Section 775.082 (1972), to provide for automatic commutation of sentences of death to life imprisonment with no eligibility for parole. Ch. 72-724, Laws of Florida (1972)[2], Fla.Stat., Section 775.082 (1972 Supp.).

The Florida Supreme Court in Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972), quickly moved to confirm Florida law on Furman, invalidating the Florida death penalty statutes and providing for re-sentencing under Fla.Stat., Sect. 775.082, 921.141 (1971). Those inmates under pre-Furman sentences of death (with the exception of Rudolph Valentine Lee, see Lee v. State, 294 So. 2d 305, infra) applied to the Florida Supreme Court for commutation.

The relief was granted in Anderson v. State, 267 So. 2d 8 (1972), wherein the Florida Supreme Court vacated all death sentences imposed before Furman and stated:

> "The only sentence which may be imposed upon conviction of the first degree crime of murder is the life imprisonment or death sentence provisions approved in Furman. The Court has no discretion." 267 So. 2d at 9.

The Court followed the Anderson decision by expediting the resentencing of the pre-Furman inmates in the case of In Re Baker, 267 So. 2d 331 (1972). The court noted that the class of prisoners petitioning for relief wished to be resentenced prior to the effective date of Ch. 72-118, supra, in order to avoid the no parole provision of that statute. The Court granted the

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2. Ch. 72-118 was to have become effective October 1, 1972, but was amended by Ch. 72-724 which deleted the no parole provision and substituted a twenty five year no parole requirement for a life sentence imposed in a capital case.

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relief with an express recognition of the inherent constitutional questions raised by any retrospective application of Ch. 72-118.[3]

The validity of the amendments included within Ch. 72-724 was established in State v. Dixon, 283 So. 2d 1 (Fla. 1973), and upheld by this Court in Proffitt v. Florida, ___ U.S. ___, No. 75-5706, July 2, 1976. The new bifurcated guilt/penalty procedure should have been given prospective application to all offenses committed subsequent to December 8, 1972, the effective date of the statutes upheld by the Court. This position was urged upon the trial court and the Florida Supreme Court in Petitioner's pre-trial Application for Constitutional Stay of Trial (Appendix D, infra). The Petitioner requested a stay in the trial proceedings specifically alleging the ex post facto prohibition as a bar to the application of Fla.Stat., Section 921.141 (1973), to this case.

Rejecting or disregarding Petitioner's argument, the Florida Supreme Court denied the application and the trial court proceeded in accordance with the decision of the First District Court of Appeal of Florida[4] in State v. Lee, 286 So. 2d 596 (1st DCA Fla. 1973), which ordered that Lee, who was sentenced to death prior to Furman, should be remanded for resentencing pursuant to the new Florida death penalty statute upheld in Dixon:

3. The Court was clearly concerned with the effect of any application of Ch. 72-118 to pre-Furman cases: "To do so (resentence pre-Furman inmates to life with no parole) would create a class statutorily denied parole . . . The uniqueness of this position would foster litigation attacking both the facial validity of the Statute (Ch. 72-118) and its selective application to an indistinguishable few . . . " 267 So. 2d at 334.

4. Under Article V of the Florida Constitution and Fla.Stat., Section 35.02 (1975), the State of Florida is divided into four appellate districts. The trial court in this case is under the direct appellate jurisdiction of the First District Court of Appeal.

> "Since during the pendency of this appeal, the statute providing for the manner in which the penalty is to be determined in capital felonies has been changed, we are bound to reverse the order setting aside appellee's death sentence and remand with directions that appellee be given a new trial on the issue of penalty only in accordance with Section 921.141, Florida Statutes, F.S.A., which has recently been upheld by our Supreme Court in State v. Dixon, supra.
>
> In reversing and remanding this case for a new penalty trial, we are not unmindful of the possible contentions that a retrial under the newly enacted death penalty statute may collide with constitutional ex post facto /5/ principles and, indeed, if one scratch is no deeper than the surface, it might appear that appellee is being subjected to a crime or penalty which did not exist either at the time of the murder or at the time of his trial, in violation of the ex post facto principle. . . . However, the newly enacted statute, Section 921.141, Florida Statutes, F.S.A., does not create a new and separate crime. Nor does it provide a new or higher penalty for first degree murder than was provided when the offense or trial herein occurred. All the new statutory provision does to attempt to provide for a manner in which the death penalty may be imposed in appropriate cases in a way that does not collide with the constitution."
> 286 So. 2d at 598, 599.

The decision of the trial court to follow the district court's opinion in Lee was not vindicated. Exactly one week from the date of the Petitioner's death sentence, the Supreme Court of Florida rendered its decision in the case of Lee v. State, 294 So. 2d 305 (Fla. 1974). The court specifically ruled on the ex post facto question as follows:

> "Under the prevailing Section 775.082, as amended by Chapter 72-724, Laws of Florida, a new provision has been added which had not been in force and effect at the time of the commission of the offense for which the defendant was charged, to-wit:

5. Fla.Const., art. I, Section 10 (p. 3, infra) does not substantially differ from the Federal constitutional ex post facto provision.

> '(1) a person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole (unless sentenced to death.)' (Emphasis supplied)

To expose this Petitioner to a greater penalty than that which originally could be imposed at the time of the commission of the offense would be an ex post facto implication and hence clearly unconstitutional. . . .

Therefore, that portion of the penalty provision dealing with the amount of punishment is clearly a creature of statute and as such forms part of the substantive law. If the subsequent statute merely reenacted the previous penalty provision without increasing any penalty provision which could have been imposed under the statute in effect at the time of the commission of the offense, then there could be no application of a subsequent penalty provision which would do violence to the concept of an ex post facto law. Since this is not the case, that portion of the district court's opinion dealing with which law is applicable for the imposition of sentence, Fla.Stat., Section 775.082, F.S.A., as amended by Chapter 72-724, must be reversed with instructions to apply the penalty provision in effect at the time of the commission of the offense."[6]

The Petitioner again raised the ex post facto question on appeal to the Florida Supreme Court subsequent to that court's decision in Lee v. State, supra. The decision affirming the

6. An inexplicable series of events then followed. The Lee case was remanded for sentencing pursuant to the statute in effect at the time of the offense. Lee's offense, as in the case sub judice occurred prior to this Court's decision in Furman and the passage of Ch. 72-724 by the Florida legislature. Upon his return, the circuit court in Duval County ordered a psychiatric examination of Lee and he was subsequently sent to the Florida State Hospital in Chattahoochee. Upon his release from the Florida State Hospital, Lee was returned to the circuit court where a new jury was empanelled and evidence of aggravation and mitigation was presented pursuant to the amended Section 921.141. The jury returned an advisory sentence of death which was accepted and imposed by the trial judge. The case is now before the Florida Supreme Court on direct appeal.

trial court's application of the death penalty to the Petitioner did not directly address the ex post facto issue and did not expressly overrule Lee. Reading Lee and Dobbert together it does not appear that any such result was intended.

The mandate of Lee v. State, supra, should have been applied to the Petitioner by the Florida Supreme Court. The application of the provisions of Fla.Stat., Section 775.082 (1) (1973) was no less an ex post facto violation to Petitioner than it was to Lee. But the decision in Lee did not clearly define the process through which a new sentence could be provided.

If, as it appears from the language of the decision, the Florida Supreme Court ruled that Lee should be remanded for resentencing pursuant to "the penalty provision in effect at the time of the commission of the offense," 294 So. 2d at 307, but only following the empanelling of a new jury to make a recommendation pursuant to Ch. 72-724 (1), Laws of Florida (1972), then the court split the ex post facto provisions of the federal and Florida constitutions: Yes, ex post facto as to the added penalty of twenty-five years no parole. No, not ex post facto, but merely procedural, as to the manner in which life or death may be given or taken away.

By characterizing the new sentencing statute as procedural[7] the court failed to fully consider the impact of the change in the method of imposing the death penalty, and the nature of an ex post facto law in general.

If there was no material impairment of a substantial right of the Petitioner by operation of the new Fla.Stat.,

7. The court cited its constitutional power to provide for court procedure: "Since the question raised is one of the procedures to be used for the imposition of sentence, it is properly within the constitutional authority for determination by this Court. . . " 294 So. 2d 308.

Sections 775.082 (1) and 921.141, as amended, e.g.: if the statute merely changed the method of execution from hanging to electrocution, Malloy v. South Carolina, 237 U.S. 180 (1915); or if the option for severance of defendants is withdrawn and placed within the discretion of the trial judge, Beazell v. Ohio 269 U.S. 167 (1925); then the legal definition of the offense and the punishment meted out remain unchanged and there is no ex post facto application.

But in the case sub judice, the Petitioner, as sentenced pursuant to the new law, received a recommendation to life imprisonment which was converted to death by the added element of judicial discretion. Whether or not such an added element is desirable is not a question raised by this petition. The point is that this element did not exist at the time of the offense in this case and operated to convert what would have been life imprisonment in 1971 to what is now a death sentence.

This is not one of those statutory changes in the mode of trial or the rules of evidence which operate only in a limited and unsubstantial manner to Petitioner's disadvantage. See, Thompson v. Utah, 170 U.S. 348 (1898). It is an attempt to change those rules of the game which change the outcome rather than those which merely make for a more orderly contest.

3. Disregarding the actual vote of the jury and the sentence finally imposed, the Petitioner faced the added penalty of life imprisonment with no parole for twenty-five years not present in the law in effect at the time of the offense charged. The test under the ex post facto clause is not merely the actual punishment ultimately inflicted. "The ex post facto clause looks to the standard of punishment prescribed by a statute rather than to the sentence actually imposed. The constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the

wrongdoer." Lindsey v. Washington, 301 U.S. 397, 401 (1937). In Lindsey, at the time of the defendant's crime, Washington law provided for up to fifteen years in the state prison upon a conviction of larceny. An amendment to the law prior to trial made the fifteen year sentence mandatory, however, and the State argued that this new law should be applied to the defendant since it did not increase the final sentence. This Court held that such an application would be ex post facto and unconstitutional, emphasizing that the "practical operation" of the two statutes must be looked to, 301 U.S. at 400.

> "Removal of the possibility of a sentence of less than fifteen years, at the end of which Petitioners would be freed from further confinement and the tutelage of a parole revocable at will, operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old. It could hardly be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change . . . yet this is only a more striking instance of the detriment which ensues from the revision of the statute providing for a maximum and minimum punishment by making the maximum compulsory. We need not inquire whether this is technically an increase in the punishment annexed to the crime, see Calder v. Bull . . . It is plainly to the substantial disadvantage of Petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the fifteen year term." 301 U.S. at 401-402.

The Petitioner faced a no-less striking instance of the detriment ensuing from the revision of Fla Stat., Section 775.082 (1) (1971).

In Warden v. Marrero, 417 U.S. 702 (1974), this Court addressed the problem of parole eligibility:

> "First, only an unusual prisoner could be expected to think that he was not suffering a penalty when he was denied eligibility for parole. . . . for the confined prisoner, parole -- even with its legal constraints - - is a long step toward regaining lost freedom. An observation made in somewhat different context is apt:
>
> > 'it may be "legislative grace" for congress to provide for parole but when it expressly removes all hopes of parole upon conviction and sentence for certain offenses, . . . this is the nature of an additional penalty.' Durrant v. United States, 410 F. 2d 689, 691 (Ca. 5 1969).
>
> Second, a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the ex post facto clause of Article I, Section 9, Clause 3, of the Constitution, of whether it imposed a 'greater or more severe punishment than was prescribed by law at the time of the . . . offense.'" 417 U.S. at 663.

Ch. 72-724, Laws of Florida (1972), contains just such a repealer of parole eligibility. The Florida Supreme Court acknowledged the ex post facto application of this repealer in Lee v. State, supra. The "serious question" of an ex post facto violation should therefore be considered by this Court.

B. EQUAL PROTECTION

1. The Petitioner, Ernest John Dobbert, Jr. and Rudolph Valentine Lee, the defendant in Lee v. State, supra, are the only two individuals charged with crimes alleged to have occurred prior to Furman and prior to the passage of Ch. 72-724, Laws of Florida (1972), who have been sentenced to die pursuant to Fla.Stat., Section 921.141 and Section 775.082, as amended by Ch. 72-724. All defendants in the State of Florida whose crimes occurred prior to Furman and who were sentenced

to die before Furman had their sentences commuted to life. In Re Baker, supra. In Baker the court noted that there would be equal protection problems unless it expeditiously sentenced all pre-Furman defendants to life imprisonment before a new statute, Ch. 72-118, Laws of Florida (1972), went into effect. As noted above, if only a few pre-Furman defendants were sentenced under this new statute, "a unique but factually undifferentiated class would be created, which was denied any chance of parole." 267 So. 2d 334 note 4. Such a "selective application (of the new statute) to an indisguishable few" would be "a seeming denial of equal protection." Id. at 335, and the court concluded that the best interest of the public was to have all pre-Furman defendants treated alike, ibid.

There were in fact defendants charged with pre-Furman offenses whose trials proceeded as non-capital punishment cases: E.g., State of Florida v. Edred Agustus Black, Case No. 72-4821-CF, Division R, Circuit Court in and for Duval County, Florida, tried May 22 through May 24, 1974, Prince v. State, 297 So. 2d 648 (1st DCA Fla. 1974), cert. den. on other grounds, 304 So. 2d 129 (Fla. 1975). Black was tried after the decision of the First District Court of Appeal in State v. Lee, supra, which was decided on November 27, 1973; yet the trial court in the case sub judice relied on State v. Lee to support the trial of the Petitioner as a capital case.

The Fourteenth Amendment equal protection clause denies "to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." Reed v. Reed, 404 U.S. 71, 75-76 (1971). Although, under this standard "a statutory discrimination will not be set aside if any state of facts reasonable may be conceived to justify it," McGowan v. Maryland, 366 U.S. 420, 426 (1961), it is impossible to attribute any rational basis for the applicability of the death penalty to this Petitioner other than a single-minded purpose of the State of Florida to take his life.

The only distinction between the Petitioner and those inmates whose death sentences were commuted to life (with no restrictions on parole) pursuant to Anderson and Baker, supra, is that Petitioner was not charged, tried and convicted until approximately two years after Furman. The equal protection issue can be best illustrated by the following:

If Petitioner's wife had been charged as a co-defendant in the first degree murder of their daughter on December 31, 1971; and if she had been tried and convicted prior to Furman pursuant to Florida law in effect at that time; and if she had not received a recommendation of mercy from the jury; then, she would have had her death sentence commuted to life pursuant to Anderson and Baker. Petitioner is then apprehended, tried, convicted and receives a vote of ten to two for life imprisonment from a jury selected pursuant to the amended Florida law. The trial judge reverses the jury and gives the Petitioner a sentence of death. The disparate results are brought about solely due to the difference in the dates of the respective trials.

Where fundamental values are concerned, classifications must be closely scrutinized to insure that they correspond to valid State concerns urged as supporting them:

> "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." See, e.g., Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Harper v. Virginia Board of Elections, 383 U.S. 663, 669-670 (1966).

This Court should review the manner in which Petitioner was classified as an individual who should be sentenced to death.

2. The general savings provision of the Florida Constitution, Article X, Section 9, provides: "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." This provision of the 1968 Florida Constitution amended the earlier Article III, Section 32, of the 1885 Constitution which provided, "the repeal or amendment of any criminal statute shall not affect the prosecution or punishment of any crime committed before such repeal or amendment." These provisions have a long history in the case law of the State of Florida.

In Raines v. State, 42 Fla. 141, 28 So. 57 (1900), the plaintiffs in error, Raines, complained of being sentenced as a felon when the crime for which he had been convicted was converted by legislative act to a misdemeanor prior to sentencing. Citing the constitutional provision of the 1885 Florida Constitution the Florida Supreme Court said:

> ". . . but Section 32 of Article III of our constitution . . . prevents the said Chapter 4728 from affecting either the prosecution or the prior prescribed penalties for any crime committed prior to the taking effect of such ex post facto law. The effect of this constitutional provision is to give to all criminal legislation a prospective effectiveness; that is to say, the repeal or amendment, by subsequent legislation, of a pre-existing criminal statute, does not become effective, either as a repeal or as an amendment of such pre-existing statute, in so far as offenses are concerned that have been already committed prior to the taking affect of such repealing and amending law."

In Ex Parte Brown, 93 Fla. 332, 111 So. 518 (1927), the Supreme Court of Florida entertained a petition for habeas corpus filed by an individual under sentence of death for a crime which occurred prior to the passage of the Florida Statute authorizing death by electrocution. The original judgment of conviction of murder

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in the first degree had been reversed and upon a second conviction the sentence imposed was death by electrocution. Brown objected to the more humane method of execution and sought to have the sentence set aside as a violation of Article III, Section 32 of the 185 Florida Constitution. The court, citing Raines, supra, agreed with Mr. Brown and returned him to the local sheriff with directions that he be hanged in accordance with the law in effect at the time of the offense. See also, Sigsbee v. State, 43 Fla. 524, 30 So. 816 (1901), Whatley v. State, 46 Fla. 145, 35 So. 80 (1903), Gray v. State, 72 Fla. 467, 73 So. 383 (1916), Shields v. State, 78 Fla. 524, 83 So. 391 (1919); cf., Higginbotham v. State, 88 Fla. 26, 101 So. 233 (1924), Washington v. Dowling, 92 Fla. 601, 109 So. 588 (1926).

More recently, the Florida courts have utilized this state constitutional provision to defeat a sentence of four years in the state prison upon a revocation of probation when the maximum sentence at the time the individual was placed on probation was two years in the state prison, Rozinski v. State, 298 So. 2d 546 (2d DCA Fla. 1974); to uphold a sentence of seven yeras in the state prison when the maximum term had changed subsequent to the date of the offense. Ellis v. State, 298 So. 2d 527 (2d DCA Fla. 1974), cert. dismissed 298 So. 2d 411 (Fla. 1974). Accord, Cooper v. Wainwright, 308 So. 2d 182 (4th DCA Fla. 1975).

If Article X, Section 9 of the Florida Constitution of 1968 has not been rescinded by the Florida Supreme Court's decision in Dobbert, supra, the Petitioner should have been sentenced under the law in effect at the time the crime was committed. He should not have been singled out for punishment under the commission of his offense. Rozinski, supra.

Petitioner and Rudolph Valentine Lee are virtually the only individuals who have not received the benefit of Fla. Const.,

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that they ignore the teachings of such momentous rulings as Sheppard v. Maxwell, 384 U.S. 333 (1966), Estes v. Texas, 381 U.S. 532 (1965), and Rideau v. Louisiana, 373 U.S. 723 (1963). Their effect has been to generally improve the conditions in state jury trials and more particularly our method of handling the trials of spectacular, big-press cases from that which caused Mr. Justice Frankfurter to lament in Irvin v. Dowd:

> "More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. . . . (N)ot a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts. . . . exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of propossessions, evidence submitted in open court." 366 U.S. at 729, 730.

Indeed, the trial judge in the case sub judice acted, on the whole, reasonably in regard to the handling of publicity during the trial proper. The various court personnel and the attorneys on both sides were placed under a "gag-order" several days prior to jury selection. The order was issued sua sponte by the court. The jurors were properly admonished not to talk among themselves about the case during the voir dire and trial. The jurors were sequestered throughout the trial.

Petitioner, however, would ask this Court to review the publicity which preceeded any action by the trial court and

which led the prosecutor in the case to announce to the press following the conviction that this was the "biggest criminal trial in Jacksonville's history." (Appendix C, p. 40c, infra). Petitioner would offer the following factual items for the Court's consideration:

1. Petitioner was accused of the premeditated murder of two of his children and with the prolonged torture of the two surviving children. This was not an ordinary case under any circumstances and was the first such trial in Jacksonville. It soon became the "nortorious" Dobbert case (Appendix C, p. 75c, infra).

2. The press engaged in speculation concerning the whereabouts of the two missing children allegedly killed by Petitioner. The statement of the State's key witness, Ernest John Dobbert, III, was quoted and paraphrased in the Florida Times Union on April 13, 1972. (Appendix C, p. 49c-51c, infra). These stories served as the basis for all future stories speculating on possible gravesites for the missing children. (Appendix C, pp. 1c, 106c, 110c, infra).

One video-tape film-clip shown at the hearing on Petitioner's Motion for Change of Venue on March 15, 1974, related the details of statements made by Ernest John Dobbert, III, under hypnosis. These statements, made available to Petitioner through pre-trial discovery, were not offered into evidence by the State at trial (apparently due to their doubtful admissibility).

3. The results of mental examinations ordered by the trial court to determine Petitioner's competency to stand trial and his sanity at the time of the alleged offenses were printed in the Florida Times Union on January 15, 1974. (Appendix C, p. 76c, infra).

4. A separate series of articles was printed relating the Petitioner's case to the rise in reporting of child abuse cases in Jacksonville (Appendix C, pp. 58c-59c, 75c, infra).

5. The report of Petitioner's arrest in Houston, Texas, was placed on the front page of both local papers in bold type in the manner usually reserved for presidential elections, assassinations or catastrophic world events (Appendix C, pp. 60c-64c, infra).

6. The hearing on Petitioner's Motion for Change of Venue included the testimony of twelve media representatives whose testimony disclosed the saturation effect of the media coverage of Petitioner's case (summary of the testimony appears at Appendix C, pp. 1c-9c, infra).

The following exchange during the voir dire examination illustrates the impact of the media coverage in the Jacksonville area:

(By defense counsel) "Q. Now, two questions that the Judge asked you. I'm not sure I remember them verbatim. He asked if you could set aside any prior opinions or prejudices that you might have formed and deliberate the case based on the evidence given to you and set aside any prior knowledge. Your answer was that you would try to set these aside. Now, you have heard about this case. Now, could you tell me how you might have heard about it, newspaper, television or discussion or how?

(By juror Robert C. Williams) A. Yes, I read articles in both newspapers.

Q. Do you subscribe to both papers?

A. Well, I might take the evening paper home with me. I don't subscribe to it.

Q. TV news coverage?

A. Yes.

Q. Now, the facts of the case or the situation when it first came to light was approximately two years ago. The crimes of which the defendant is accused happened over a three or four month period prior to that. Now, is it safe to say, you said you read most of the newspaper articles. Over the past two years you read about it and up until the present time?

A. Yes, up until Monday."

7. The press was allowed to sit within the bar during the voir dire examination and throughout the trial. Public outcry was heard in the courtroom directed against the Petitioner, causing Petitioner's attorney to comment, "I feel we're being exposed to anybody on the street. Everybody has something to say."

8. Of the eighty-eight jurors examined only thirteen said they had no knowledge of the facts of the case. Of the thirteen, only two actually sat on the final jury.

9. Unlike the publicity in which abated approximately seven months prior to the actual trial, the coverage in Petitioner's case was continuous. It began on the date of his son's statement to the police on April 13, 1972, carried through Petitioner's arrest in Texas and his ultimate extradition to Florida, and reached a peak of daily coverage during the weeks preceeding the trial. Coverage did not end with the conviction. Deep-seated feelings against Petitioner were exposed in letters released by the trial judge to the press following sentencing (Appendix C, pp. 41c, 46c, infra). The prosecutor participated in a post-trial summary of his trial preparation detailing his role in "the biggest criminal trial in Jacksonville's history" (Appendix C, p. 40c, infra).

Petitioner's efforts to obtain appellate review and the outcome of the appeal to the Supreme Court of Florida were reported as matters of continuing interest to local citizens.

10. The trial court and the attorneys agreed to select the jurors one at a time, in camera, due to the high risk of the answers' of one juror prejudicing those not yet questioned. After having interviewed twenty-seven jurors, with only five having no knowledge of the case, the trial court decided to abandon the in camera voir dire and began to call three jurors at a time. The court began timing the defense and the State on voir dire and repeatedly prompted the attorneys to speed up the selection. The

court again accelerated the process and began to call six jurors at a time (Appendix C, p. 15c, infra).[8]

The instances noted above do not exhaust the examples of the prejudicial effect of the publicity in Petitioner's case. A review of the voir dire examination shows that those jurors who expressed a firm opinion of Petitioner's guilt were excused, either for cause or peremptorily; yet challenges for cause remove the honest jurors -- those who admit that they cannot put aside the conscious and unconscious pressures exerted by the daily barrage from the local media:

(By defense counsel) "Q. Now, Mr. Alderman, you said that you had heard quite a bit about the case, is that correct, before you came to Court?

(By juror Archie G. Alderman) A. Yes.

Q. How did you hear about that?

A. Radio and TV.

Q. Did you say you followed it closely?

A. I didn't follow it deliberately. It was there. Every morning you turn TV on and see what is happening.

Q. Did you have a fixed opinion when you came in the Courtroom a few days ago as to the guilt or innocence of my client, Mr. Dobbert?

A. Yes.

Q. You did?

A. Yes.

Q. What was that opinion?

A. That he was guilty. . . . "

Where the crime charged is itself so inflammatory and emotive, the subtle pressures and opinion-producing elements

8. References to the record below have been deleted.

cannot be objectively measured so as to allow a court or an individual to point to juror number one or juror number twelve and say, "he is the one who did not admit that he could not put aside what he had heard and seen and read." As Justice Boyd said in his dissenting opinion below:

> "The Constitutions of the United States and Florida permit the news media to write extensively about crime and criminals and to discuss the gory details of crime before and during trials. This is a constitutional right that I recognize and respect; however, other constitutional provisions grant persons charged with crime the right to be tried fairly, under dur process of law, in an atmosphere of fairness and without prejudice in the minds of the jury. Rarely in the history of Florida has any crime created greater public attention than the activities of the Appellant in the treatment of his children, culminating in two convictions of murder and two convictions of child abuse (sic). It is my opinion that the court should have granted the motion for change of venue in order that the Appellant might be tried in some part of Florida in which the magnitude of his crimes was not so widely known and so freely discussed among the populace." Dobbert, supra at 443, 444, (Appendix A, pp. 18a, 19a, infra).

As in Irvin, supra, the buildup of publicity is clear and convincing and its effect was so prejudicial to the Petitioner as to raise this serious question of a violation of constitutional due process.

CONCLUSION

For the reasons stated above, the Court should grant a writ of certiorari to review the decision of the Supreme Court of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy hereof has been furnished to the Attorney General's Office, Capitol Building, Tallahassee, Florida, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, and Petitioner, Florida State Prison, Raiford, Florida, by mail, this 31st day of August, A.D. 1976.

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